

FINAL STATEMENT OF REASONS

Amendment to California Code of Regulations, title 15, section 2253 Voluntary Waivers, Stipulations of Unsuitability, Postponements and Continuances

The proposed amended regulation regarding the delay of life prisoner hearings establishes the parameters and notice times required by the Board of Parole Hearings (board). The regulation identifies these types of delays as voluntary waivers, stipulations of unsuitability, postponements and continuances.

Amendments to this regulation were subject to the meet and confer process in the class action matter entitled *In re Jerry Rutherford*, Marin County Superior Court Case No. SC13539. The parties could not agree on several provisions and submitted their respective alternate versions to the *Rutherford* court, which ruled on these issues on February 19, 2008.

The specific purpose of each amendment of the proposed text and the rationale supporting the Board's determination that each amendment is reasonably necessary to carry out the purpose for which the amendment is proposed is as follows:

Proposed amended section 2253(a). General.

This section identifies those prisoners that are serving life sentences with the possibility of parole as the group affected by the regulation. Any prisoner serving a life sentence and appearing before the Board for a parole consideration hearing may have that hearing delayed through a process of voluntary waiver, a stipulation to unsuitability, a postponement or a continuance, subject to certain parameters.

Proposed amended section 2253(b). Voluntary Waivers.

This section provides a mechanism for a life prisoner to request to voluntarily waive his or her right to a parole consideration hearing for any reason. If a voluntary waiver is granted, the life prisoner's next hearing will be scheduled at one, two, three, four or five years from the date the scheduled hearing was to take place.

A request for a voluntary waiver must be submitted to the Board for consideration no later than forty-five (45) calendar days prior to the date of the scheduled hearing. A request submitted no later than forty-five (45) calendar days shall be presumed to be valid. A request submitted less than forty-five (45) calendar days prior to the scheduled hearing shall be presumed to be invalid and denied by the Board absent a showing of good cause.

If a request for a voluntary waiver is granted during the week of the scheduled parole consideration hearing, the Board shall give the District Attorney and/or the victim or victim's next of kin or designated representative the opportunity to give a statement on

the record. The record shall be made available for consideration by the next hearing panel. The life prisoner may waive his or her right to be present for such statements.

Life prisoners may waive no more than three consecutive parole consideration hearings.

Proposed amended section 2253(c). Stipulations of Unsuitability.

This section permits a life prisoner to offer to stipulate to unsuitability of parole at any time prior to their scheduled parole consideration hearing. An offer to stipulate to unsuitability must be submitted in writing and shall set forth the reasons that support unsuitability. In considering the offer to stipulate to unsuitability the Board shall review any written statements received from the District Attorney and/or the victim or victim's next of kin or designated representative. The Board retains the discretion to accept or reject the offer to stipulate. If an offer to stipulate to unsuitability is granted, the life prisoner's next hearing will be scheduled at one, two, three, four or five years from the date the scheduled hearing was to take place.

If an offer to stipulate to unsuitability is granted during the week of the scheduled parole consideration hearing, the Board shall give the District Attorney and/or the victim or victim's next of kin or designated representative the opportunity to give a statement on the record. The record shall be made available for consideration by the next hearing panel. The life prisoner may waive his or her right to be present for such statements.

Proposed amended section 2253(d). Postponements.

This section details circumstances where it may be appropriate to postpone a parole consideration hearing. Under the proposed regulation, a parole consideration hearing may be postponed due to the absence or untimeliness of required Department or Board documents and/or board notices, documents, reports or prisoner accommodations, or where there are exigent circumstances such as illnesses of the attending parties, natural disasters, and institutional emergencies.

A life prisoner may request a postponement to resolve others matters relevant to his or her parole consideration. In these cases, the board may only grant a postponement upon an affirmative of showing of good cause by the prisoner and only if the prisoner did not and could not have known about the need for the postponement earlier that when he or she made the postponement request. For purposes of this subsection, good cause is defined as a prisoner's excused inability to obtain essential documents or other material evidence or information, despite his or her diligent efforts.

If a postponement is granted the week of the scheduled parole consideration hearing, the Board shall give the District Attorney and/or the victim or victim's next of kin or designated representative the opportunity to give a statement on the record. The record shall be made available for consideration by the next hearing panel. The life prisoner may waive his or her right to be present for such statements. If statements are taken, a transcript shall be made and a copy provided to the life prisoner.

Proposed amended section 2253(e). Continuances.

This section details circumstances when a parole consideration hearing can be continued. After the commencement of a parole consideration hearing, the Hearing Panel Chair may continue a hearing only upon a showing of good cause. In considering a continuance, the Hearing Panel Chair shall weigh the reasons and the need for the continuance and any inconvenience to the board, Department, or appearing parties and determine what will be in the best interest of justice. If the parole consideration hearing is continued the board shall attempt to impanel the same panel members when the hearing is reconvened.

If a continuance occurs, the Board shall give the District Attorney and/or the victim or victim's next of kin or designated representative the opportunity to give a statement on the record. The record shall be made available for consideration by the next hearing panel.

ALTERNATIVE DETERMINATION

The board has determined that no reasonable alternatives identified or considered would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome than the proposed regulatory action

LOCAL MANDATE DETERMINATION

The proposed regulation does not impose any mandate on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD FROM APRIL 25, 2008 THROUGH JUNE 9, 2008.

The originally proposed text was made available for public comment for at least 45 days from April 25, 2008 through June 9, 2008. Three written comment letters were received during that period. No comments were received during the public hearing conducted on June 18, 2008. Pursuant to Government Code section 11346.9(a)(3), the Board of Parole Hearings has summarized and responded to those comments as follows:

Michael Brodheim, letter dated April 26, 2008
Comment #1: Subsection 2253(b)

The proposed regulation requires that a prisoner submit a voluntary waiver request to the Board of Parole Hearings 45 calendar days prior to the date of the scheduled hearing. Yet there is no requirement that the prisoner be informed of the date of the hearing before the 45-day cutoff period so that the prisoner may comply with this requirement. The prisoner would be unable to exercise his or her rights in a timely manner if he or she is not informed of the hearing date.

Response:

Subsection (b)(3) of the proposed regulation already contemplates circumstances where a prisoner may request a voluntary waiver less than 45 days prior to a scheduled hearing. Prisoners normally receive a Notice of Rights, which includes a notice of the hearing approximately 120 to 150 days prior to the scheduled parole hearing. In a situation, as described by the commenter, where a prisoner did not receive notice of his or her scheduled hearing 45 days prior to the hearing date, the prisoner would have good cause to request a voluntary waiver less than 45 days prior to the scheduled hearing under subsection (b)(3) of the proposed regulation.

Accommodation: None.

Miller Paralegal, Donald A. Miller, M.D., J.D., letter dated April 28, 2008

Comment #2: Subsection 2253(b)

The commenter states that the 45-day advance notice is impractical. The previous deadline was 10 days and that was sufficient. In addition, the board has given no justification for this modification. Quite often the request for a voluntary waiver occurs after a circumstance which may arise only one or two weeks prior to the hearing. Therefore, the 10 day period should remain in effect.

In addition, the proposed modification to section 2253(b) is absurd and unjustified because a waiver should often be for one or two months depending on the reason, not one, two, three, four or five years. The Board has given no justification for the long setoffs, which effectively punish the inmates for requesting waivers.

Response:

The commenter objects to the proposed regulation on the presumption that a prisoner's ability to request a hearing postponement has been supplanted with the new provisions for requesting a voluntary waiver. This is incorrect as the proposed regulation allows for a prisoner to request a voluntary waiver or a postponement (or a stipulation of unsuitability). The 10-day period referred to by the commenter is the time-frame in the current version of the regulation by which a prisoner must request a hearing postponement. In subsection (d)(2) of the proposed regulation, the 10-day period has been removed and a prisoner may request a postponement for good cause at any time.

The second issue raised by the commenter again does not contemplate that the proposed regulation still permits a prisoner to request a hearing postponement for a few months. Although voluntary waivers must be requested in year increments pursuant to subsection (b)(1) of the proposed regulation, a request for a hearing postponement would be rescheduled, under subsection (d)(3) of the proposed regulation, to a date consistent with resolution of the issue causing the postponement.

Accommodation: None.

Rosen, Bien & Galvan, LLP, Anne Mania, letter dated June 9, 2008 to Deputy Attorney General, Jay C. Russell

Comment #3: Subsection 2253(d)(1)

The commenter objects to language in subsection (d)(1) of the proposed regulation that would allow a parole consideration hearing to be postponed if a required prisoner accommodation was unavailable and requests that the words “required prisoner accommodations” be deleted from the proposed regulation.

The commenter states that the *Armstrong* (*Armstrong v. Schwarzenegger*, U.S. District Court, Northern District of California, Case No. C94 2307 CW) injunction prohibits the board from postponing or delaying any parole proceeding because the September 2007 Order states in pertinent part that, “[d]efendants’ failure to provide a necessary accommodation for a disability does not constitute good cause for delaying any parole proceeding. . .”

As to a second issue, the commenter requests that in the most unusual cases where the board has failed to supply an accommodation to a prisoner and the hearing must be rescheduled, that the new hearing take place no more than 35 days from the date of the postponement.

Response:

Amendments to this regulation were subject to the meet and confer process in the class action matter, *In re Jerry Rutherford*, Marin County Superior Court Case No. SC135399A. *Rutherford* class counsel is co-counsel with the commenter in *Armstrong*. During the meet and confer, the parties could not agree on several provisions of the proposed regulations and submitted their respective versions to the *Rutherford* court, which ruled on these issues on February 19, 2008. The proposed language in subsection (d)(1) to which the commenter objects is identical to the language submitted to the *Rutherford* court by her *Armstrong* co-counsel.

On June 17, 2008, the Office of the Attorney General responded to commenter by attached letter. In particular, the Office of the Attorney General stated that, “[i]t is neither a violation of the *Armstrong* remedial plan, recent orders in *Armstrong*, nor of

federal, state or local law for prison officials to make contingency plans for providing required accommodations for an inmate when they are unexpectedly unavailable in a single instance.” Moreover, removing the language suggested by the commenter could result in a parole consideration hearing being conducted without providing a required accommodation.

In the unexpected case where a parole consideration hearing must be postponed because of the lack of the usual and required ADA accommodation, the postponed hearing would be given the highest priority for rescheduling. In accordance with subsection (d)(3) of the proposed regulation, the hearing shall be rescheduled at a date consistent with the resolution of the issue, the need to provide notice to affected parties, and panel availability.

Accommodation: None.

ECONOMIC IMPACT ON SMALL BUSINESSES

No commenter proposed an alternative to lessen any adverse economic impact on small businesses.

